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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CLAIRE CRANE, ARNOLD CRANE and CLAIRE CRANE d/b/a CLAIRE CRANE CONSTRUCTION COMPANY,

Petitioners,

v.

EDWARD HINES LUMBER COMPANY, an Illinois corporation, EDWARD L. DAUGHERTY, FRANKLIN I. KRAL and UNKNOWN CO-CONSPIRATORS, both Jointly and Individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS, EDWARD HINES LUMBER COMPANY AND EDWARD L. DAUGHERTY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COMPLIANCE WITH RULE 28.1

Pursuant to United States Supreme Court Rule 28.1, Edward Hines Lumber Company states that it has the following subsidiaries which are not wholly owned:

Southern Mineral Corporation, Inc.;
Northern Mineral Corporation; and
EHLCO Foundation, an Illinois not-for-profit corporation.

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SUMMARY OF GROUNDS FOR DENYING REVIEW OF CERTIORARI

Petitioners have wholly failed to set forth any basis for review of the dismissal of their action on certiorari. Ignoring the guidelines set forth in Rule 17 of the rules of this Court, the petition merely consists of a general-

ized and unsupported attack on Respondents and the entire judicial system. The plain fact is that the District Court correctly dismissed Petitioners' action for lack of jurisdiction and that ruling was properly affirmed on appeal.

Petitioners' action, brought pursuant to Title 42 U.S.C. §§1343(3) and 1983, was founded on the allegation that they were deprived of their constitutional right to a trial by jury when a decision against them was rendered *in a state court* equity proceeding for foreclosure on a mechanic's lien. It is, however, well settled that the Seventh Amendment is inapplicable to state courts. Moreover, Petitioners' counterclaim seeking damages at law remains pending in the state court and no determination precluding trial by jury has yet been made. Consequently, the complaint was properly dismissed for lack of jurisdiction as being "obviously frivolous" and constitutionally insubstantial.

Additionally, Petitioners' complaint alleged nothing more than that Respondents participated in the judicial process by filing a lawsuit and rendering a decision therein. Such actions, however, cannot form the basis for jurisdiction under section 1983. Although Petitioners may be dissatisfied with the state court holding a bench trial on the mechanic's lien prior to transferring the counterclaim to law division for a jury trial, that decision was required under the applicable state statute governing the trial of equitable and legal matters. If Petitioners feel agrieved, their remedy is to appeal the decision to the state appellate and supreme courts and not to institute a civil rights action in federal court. Moreover, with the counterclaim still pending in state court, the District Court properly stayed its hand in the interests of equity, comity and federalism. As such, the Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS HAVE FAILED TO SET FORTH ANY GROUNDS MERITING REVIEW ON CERTIORARI. THEIR VITUPERATIVE ATTACK ON THE JUDICIAL SYSTEM CANNOT OVERCOME THE FACT THAT THEY HAVE FILED A FRIVOLOUS LAWSUIT.

None of the "considerations governing review on certiorari" set forth in Rule 17 of the rules of this Court are here present. No federal question is involved; there are no conflicting decisions in the Court of Appeals; there is no conflict with any applicable decisions of this Court; and the judgment of the Court of Appeals does not conflict with Illinois law.

On the contrary, the lack of jurisdiction of the federal courts to entertain the instant suit has been well established. In their District Court Complaint, Petitioners asserted that a judgment entered against them by Chancery Judge Kral in foreclosing a mechanics lien in an Illinois state court should be overturned because they were denied their purported right to a jury trial. The alleged basis for the District Court's jurisdiction was Title 42 U.S.C. §1343(3) in that the bench trial purportedly violated Title 42 U.S.C. §1983, the Seventh and Fourteenth Amendments to the United States Constitution.

Initially, it must be noted that the dismissal of Petitioners' Complaint was warranted due to the fact that the allegations of the Complaint failed to allege an existing deprivation of due process or equal protection upon which jurisdiction under Title 42 U.S.C. §1343(3) can rest. See *Humphreys v. Burke,* 502 F.Supp. 449, 452 (D.N.J. 1980).

Although Petitioners complain that they have been deprived of a jury trial on their counterclaim, the assertion is untrue. Judge Kral transferred the counterclaim (which is not described in the record and which could relate to matters having no bearing to the foreclosure action), to law division where it remains pending. No determination precluding trial by jury on the counterclaim has yet been made. While Petitioners speculate that the trial judge will rule that Judge Kral's decision on the foreclosure court precludes a jury trial, ". . . such speculation is an insufficient foundation on which to base federal jurisdiction." *Humphreys v. Burke, supra* at 543; *Cousins v. Wigoda*, 463 F.2d 603, 607 (7th Cir. 1972).

Moreover, Petitioners' claim of a constitutional right to a jury trial in state court is patently frivolous and therefore constitutionally insubstantial mandating dismissal. The issue raised by this case was crystallized in *Hagans v. Lavine*, 415 U.S. 528, 538-39, 94 S.Ct. 1372, 39 L.Ed.2d 577, 578 (1974), wherein this Court stated:

> "Here §§ 1343(3) and 1983 unquestionably authorized federal courts to entertain suits to redress the deprivation, under color of state law, of constitutional rights. It is also plain that the complaint formally alleged such a deprivation. The district court's jurisdiction, a matter of threshold determination, turned on whether the question was too insubstantial for consideration."

Constitutional insubstantiality results if the lawsuit is "obviously frivolous" (*Hannis Distilling Co. v. Baltimore*, 216 U.S. 285, 288, 54 L.Ed. 482, 30 S.Ct. 326 (1910)), or is clearly unsound in light of prior case law. *Ex parte Poresky*, 290 U.S. 30, 31-32, 78 L.Ed. 152, 54 S.Ct. 3 (1933).

The precise issue raised by Petitioners' Complaint was considered and rejected as frivolous in *Wartman v. Milwaukee County Court*, 510 F.2d 130 (7th Cir. 1975), wherein the district court, *sua sponte*, dismissed a §1983 action filed against the state court and an insurance company. As in the case at bar, Plaintiffs there asserted that they had been denied their constitutional right to a jury trial in a suit brought against them in the state court by the insurance company. In affirming the district court's dismissal, the court stated:

> "In the case before us, however, a remand is unnecessary since the district judge's determination that the complaint is frivolous is correct and leave to proceed in forma pauperis could have been denied. *The Seventh Amendment, upon which plaintiffs' claim is grounded, does not apply in state courts.* Moreover, the federal district court does not have jurisdiction over the state, and if we assume the judge of the court is intended as the defendant, he is immune from liability for damages. Finally, the only activity of the insurance company which could be considered as being 'under color of state law' for the purposes of 42 U.S.C. §1983 would be its character as plaintiff in the state court action and this would not be sufficient." (emphasis added) (510 F.2d at 134).

The court in *Iacaponi v. New Amsterdam Casualty Co.*, 258 F. Supp. 880, *aff'd*, 379 F.2d 311, *cert. denied*, 389 U.S. 1054 (W.D.Pa. 1966), similarly held:

> "A litigant in a state court civil action has no constitutional right to a trial by jury under the Seventh Amendment or under the due process clause of the Fourteenth Amendment. A State may establish its own procedures and practices with regard to the conduct of civil litigation including the right of trial by jury. *Hardware Dealers Mut. Fire Ins. Co. of Wisconsin v. Glidden Co.*, 284 U.S. 151, 52 S. Ct. 69, 76 L.Ed. 214 (1931)." (258 F. Supp. at 884).

Accord: *Minneapolis & St. L. R.R. v. Bombolis*, 241 U.S. 211, 217 (1916); *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1171 n.12 (5th Cir. 1979); *In re Estate of Grabow*, 74 Ill.App.3d 336, 338, 392 N.E.2d 980 (1979).

The law being well settled, both the district court and the court of appeals properly found that Petitioners' claim of a violation of their purported right to a jury trial was "obviously frivolous" mandating dismissal for want of jurisdiction.

II.

JURISDICTIONAL GROUNDS UNDER §1983 OR §1343 ARE ALSO LACKING WHERE, AS HERE, PETITIONERS ALLEGED INJURY RESULTING ONLY FROM "JUDICIAL ACTS." THEIR ATTEMPT TO USE §1983 AS A SUBSTITUTE FOR AN APPEAL IN STATE COURT IS CONTRARY TO LAW.

In addition to erroneously claiming a constitutional right to a jury trial, Petitioners' complaint, stripped of its hyperbole and conclusory statements, alleged nothing more than that Respondents, Hines and Daugherty, filed a lawsuit and produced testimony at trial while Judge Kral did nothing more than make a decision (to try the foreclosure action first) which he was required to make under Illinois Supreme Court Rule 232. That Rule, governing the trial of equitable and legal matters, specifically provides:

> "(a) Trial of a Single Equitable Cause of Action. When matters are treated as a single equitable cause of action as provided in Rule 131(a), they shall be heard and determined in the manner heretofore practiced in courts of equity. When legal and equitable matters that may be asserted separately are pleaded as provided in Rule 135(b), the court shall first deter-

> mine whether the matters joined are properly severable, and, if so, whether they shall be tried together or separately *and in what order.*
>
> (b) Trial of Joined Equitable and Legal Matters. If the court determines that the matters are severable, the issues formed on the law counts shall be tried before a jury when a jury has been properly demanded, or by the court when a jury has not been properly demanded. The equitable issues shall be heard and decided in the manner heretofore practiced in courts of equity." (emphasis supplied). (Ill. Rev. Stat. Ch. 110A, Rule 232).

The mere invocation of the exercise of judicial authority by Hines and Daugherty, however, is not a basis for the assertion of jurisdiction under §1983. The acts of filing a claim, testifying at trial, and representing a client in a legal proceeding do not constitute acts "under color of state law" for §1983 purposes: they are simply private acts. *Grow v. Fisher*, 523 F.2d 875 (7th Cir. 1975); *Taylor v. Nichols*, 558 F.2d 561 (10th Cir. 1977); *Dahl v. Akin*, 630 F.2d 277 (5th Cir. 1980); *Schaffer v. Cook*, 634 F.2d 1259 (10th Cir. 1980). In *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980), upon which Petitioners rely, a judge received bribes and illegally enjoined plaintiffs from producing minerals under certain oil leases thereby depriving them of property without due process of law. In contrast, nothing in the record in the instant case indicates that the parties acted outside the confines of the neutral judicial forum. Moreover, Petitioners here have not been deprived of any federal right. As noted *supra*, their claimed "right" to a jury trial is simply inapplicable to state courts.

Nor do the conclusory statements that certain allegations of the foreclosure complaint were untrue and made in bad faith and that Hines, Daugherty and Judge Kral

acted maliciously, oppressively, vindictively and in concert add anything of substance for jurisdictional purposes. Even if Hines and Daugherty could be accused of the tort of abuse of process (and simply by filing a foreclosure action containing unspecified allegations which "were untrue and made in bad faith" (Complt. ¶40), they could not), there still would be an insufficient foundation for jurisdiction under § 1983. *Taylor v. Nichols, supra.* That section ". . . is not designed to be a 'font of federal tort law' " (*Environmental Aid, Inc. v. Goddard,* 433 F.Supp. 906, 913 (W.D. Pa. 1977); *Paul v. Davis,* 424 U.S. 693, 701, 42 L.Ed.2d 405, 413, 96 S.Ct. 1155 (1976)) and the fact that a tort may have been committed by Hines and Daugherty does not mean that a federal constitutional right has been invaded. *Id.; Beker Phosphate Corp. v. Muirhead,* 581 F.2d 1187 (5th Cir. 1978).

Moreover, nothing in the record indicates that any of the parties acted outside the confines of the neutral function of a judicial forum. As declared by the court in *Celano v. Celano,* 537 F.Supp. 690, 695 (E.D. Pa. 1982):

> "Since in most instances a judge will 'agree' with one party and disagree with another in rendering a decision, it is evident that more than this simple form of 'agreement' is required to allege joint activity between an attorney, as private party, and a judge, as state official. Otherwise, counsel could state a cause of action under § 1983 whenever a judge was persuaded by the prevailing party to render a decision adverse to the losing party."

See also *Sparkman v. McFarlin,* 601 F.2d 261, 262 (7th Cir. 1979) (Fairchild, C. J., concurring); *Johnson v. Stone,* 268 F.2d 803, 804-05 (7th Cir. 1959).

The underlying issue of Petitioners' complaint is simply whether Judge Kral, pursuant to Illinois Supreme Court

Rule 232, properly tried the foreclosure action before transferring the remainder of the suit to law division. Viewed from this perspective, it is clear that the complaint is nothing more than an improper attempt to have Judge Kral's decision overturned by the federal courts rather than the appellate courts of Illinois.

Section 1983, however, is not a substitute for an appeal to the Illinois Appellate and Supreme Courts. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975); *Environmental Aid, Inc. v. Goddard*, 433 F.Supp. 906 (W.D. Pa. 1977); *Resources for Human Development, Inc. v. Ferber*, 387 F.Supp. 111 (E.D. Pa. 1975); *Reich v. City of Freeport*, 388 F.Supp. 953 (N.D. Ill. 1974), aff'd, 527 F.2d 666 (7th Cir. 1975). As the court so aptly stated in *Environmental Aid, supra* at 911:

> "If summary judgment were to be denied, it would encourage any litigant dissatisfied with a state court decree involving state officials acting under color of law to appeal by bringing a civil rights action in a federal district court without exhausting state appellate remedies."

Petitioners' remedy similarly lies with pursuing those avenues of relief provided by the Illinois appellate process and their federal action was properly dismissed.

III.

EVEN IF, *ARGUENDO* ONLY, THE COMPLAINT STATED A JURISDICTIONAL BASIS, PRINCIPLES OF EQUITY, COMITY AND FEDERALISM REQUIRED DISMISSAL OF THIS CASE.

The remaining pendency of the counterclaim in the law division is an immovable object which repels the force of the complaint even if it does state a jurisdictional basis. It is well settled that principles of equity, comity and

federalism bar interference by federal courts in ongoing state proceedings unless there is no opportunity for plaintiffs to vitiate their constitutional rights either because of bias by the state court judges who will hear the matter at the trial and appellate levels or because the state statute under which the litigation arose is unconstitutional in every word, paragraph and clause. See *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975); *Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977).

Neither precondition has been met in the instant case. There has been no allegation of bias nor that Illinois Supreme Court Rule 232 is unconstitutional. Indeed, it would be totally incongruous for Petitioners to allege that Rule 232 is unconstitutional since they base their claim upon its alleged violation. Additionally, the state courts are competent to rectify any purported violation of Petitioners' constitutional rights. See *Bateman v. South Carolina State Port Authority*, 298 F.Supp. 999 (D.S.C. 1969); *Lynch v. Snepp*, 472 F.2d 769, 774 (4th Cir. 1973). Under these circumstances, abstention is required. *Trainor v. Hernandez*, 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486; *Huffman v. Pursue, Ltd., supra.*

CONCLUSION

For all of the foregoing reasons and upon the authorities cited, the Petition for *Writ of Certiorari* should be denied.

Respectfully submitted,

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